No. 78-893

In the Supreme Court of the United States

OCTOBER TERM, 1978

LEONARD PELTIER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statement	2
Argument	4
Conclusion	18

CITATIONS

Cases:

Autry v. *Wiley*, 440 F.2d 799, cert. denied, 404 U.S. 886	8
Franks v. *Delaware*, No. 77-5176 (June 26, 1978)	6
Frisbie v. *Collins*, 342 U.S. 519	7
Gerstein v. *Pugh*, 420 U.S. 103	7
Johnson, In re, 167 U.S. 120	7
Ker v. *Illinois*, 119 U.S. 436	6
Shapiro v. *Ferrandina*, 478 F.2d 894, cert. dismissed, 414 U.S. 884	7
Sibron v. *New York*, 392 U.S. 40	16
United States v. *Beechum*, 582 F.2d 898, petition for cert. pending, No. 78-5774	16
United States v. *Blackwood*, 456 F.2d 526, cert. denied, 409 U.S. 863	11
United States v. *Cullen*, 454 F.2d 386	13
United States v. *Haggett*, 438 F.2d 396, cert. denied, 402 U.S. 946	9
United States v. *Lira*, 515 F.2d 68, cert. denied, 423 U.S. 847	7
United States v. *Myers*, 550 F.2d 1036	14, 15

Cases—Continued Page

United States v. *Pacelli*, 521 F.2d 135, cert. denied, 424 U.S. 911 11
United States v. *Rauscher*, 119 U.S. 407 6
United States v. *Toscanino*, 500 F.2d 267 7
United States v. *Vole*, 435 F.2d 774 ..... 12, 13
United States ex rel. Lujan v. *Gengler*, 510 F.2d 62, cert. denied, 421 U.S. 1001 7

Treaty, statutes and rules:

Webster-Ashburton Treaty, 8 Stat. 572, 576, Article X 5
18 U.S.C. 2 2
18 U.S.C. 1111 2
18 U.S.C. 1114 2
Federal Rules of Evidence:

Rule 403 9
Rule 404(b) 11, 15

Miscellaneous:

Friedman, Lissitzyn & Pugh, *International Law* (1969) 7

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 585 F.2d 314.

JURISDICTION

The judgment of the court of appeals was entered on September 14, 1978. A petition for rehearing was denied on October 27, 1978. On November 17, 1978, Mr. Justice Blackmun extended the time for filing

a petition for a writ of certiorari to December 4, 1978, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the district court lacked jurisdiction over petitioner because his extradition from Canada was based, in part, upon false affidavits.

2. Whether, in the circumstances of this case, the district court abused its discretion in excluding testimony by the maker of the false affidavits that two FBI agents had coerced her into signing the affidavits.

3. Whether the district court properly refused to instruct the jury that it constituted affirmative evidence of the weakness of the government's case if the government or any of its agents induced any witness to testify falsely in this or any related case.

4. Whether the district court abused its discretion in admitting evidence of petitioner's connection with other crimes and other weapons.

STATEMENT

After a jury trial in the United States District Court for the District of North Dakota, petitioner was convicted of the first degree murder of two FBI agents on the Pine Ridge Indian Reservation in South Dakota, in violation of 18 U.S.C. 1111, 1114, and 2. He was sentenced to consecutive terms of life imprisonment. The court of appeals affirmed in a comprehensive opinion on which we largely rely (Pet. App. 1a-40a).

As thoroughly detailed in the opinion of the court of appeals (Pet. App. 1a-6a), the evidence at trial showed that FBI Agents Ronald Williams and Jack Coler met their deaths on June 26, 1975, while attempting to locate and arrest four individuals who were charged with armed robbery and assault with a deadly weapon. As part of that endeavor, the agents, in separate automobiles, followed a van into the Harry Jumping Bull Compound on the Pine Ridge Indian Reservation. After the van stopped at a fork in the road, its occupants emerged and began a gun battle with the agents, in which other residents on the reservation joined. The agents were badly wounded in the gun fight and were thereafter shot at point blank range and killed.

The following evidence linked petitioner to the murders: (1) petitioner had a motive to kill the agents, since he believed that they were on the reservation to arrest him on a state warrant charging him with attempted murder; (2) petitioner was an occupant of the van that the agents had followed onto the reservation; (3) petitioner was seen, just prior to the moment that the wounded agents were killed, standing by their automobiles with two other individuals, Robert Eugene Robideau and Darrell Dean Butler, holding what ballistic and other evidence identified as the murder weapon;[1] (4) on the evening after

[1] Robideau and Butler were also charged with the murders, as was James Theodore Eagle, one of the persons whom the agents had entered the reservation to apprehend. Robideau and Butler were tried jointly in the Northern District of Iowa,

the murders had occurred, petitioner was overheard discussing certain details of the murders with Robideau and Butler; (5) petitioner fled first the reservation, then South Dakota, and finally from the United States to Canada, resisting arrest with deadly force when he was stopped in Oregon in the course of his flight; and (6) at the time of petitioner's attempted arrest in Oregon, the revolver of one of the slain agents was found, in a bag bearing petitioner's thumbprint, in the vehicle in which he was riding.

ARGUMENT

1. Among the items submitted by the government to Canadian authorities in support of its successful extradition effort were two affidavits executed by Myrtle Poor Bear in which she alleged that she had seen petitioner commit the murders (see Pet. App. 43a-48a). Poor Bear had executed an earlier affidavit in which she alleged (as she did in the first of the two affidavits submitted to Canadian authorities) that petitioner had planned the killing of any law enforcement official who came on the reservation and thereafter admitted the murder of the two agents, but in which she also stated that she had left the reservation before the homicides occurred (see Pet. App. 41a-43a).[2] Petitioner contends (Pet.

while petitioner was a fugitive, and were acquitted. The charges against Eagle were dismissed on motion of the government.

[2] The earlier affidavit was produced by the government during the trial of Robideau and Butler pursuant to a discovery request and was submitted by petitioner to the Canadian Minister of Justice as newly discovered evidence in connection with his unsuccessful appeal from the extradition order (see Pet. 4-5). During oral argument of this case in the court of appeals, government counsel acknowledged that the affidavits were contradictory and that Poor Bear was "an unbelievable witness" (Pet. App. 49a-52a).

9-12) that the submission of the Poor Bear affidavits in the extradition proceeding constituted a fraud that violated Article X of the Webster-Ashburton Treaty (8 Stat. 572, 576) governing extradition between this country and Canada [3] and that this "violation of the clear intent and meaning of an extradition treaty deprived the trial court of jurisdiction." [4]

We, of course, agree with the court of appeals (Pet. App. 39a n.18) that these flawed affidavits should not have been submitted to the Canadian authorities. But the fact that the affidavits were submitted provides no basis to second guess the decision of Canada to extradite petitioner or to hold that the district court was without jurisdiction to try him for the murders. The extradition order was the product of extended hearings before a Canadian court;

[3] Article X of the treaty provides in pertinent part:

> It is agreed that the United States and Her Britannic Majesty shall * * * deliver up to justice all persons who, being charged with the crime of murder * * * shall seek an asylum, or shall be found, within the territories of the other: provided that this shall only be done upon such evidence of criminality as, according to the laws of the place where the fugitive or person so charged shall be found, would justify his apprehension and commitment for trial * * *.

[4] Petitioner raised this issue for the first time in his supplemental brief on appeal.

as the court below found, wholly apart from the Poor Bear affidavits, "other substantial evidence of Peltier's involvement in the murders was presented in the extradition proceedings" (Pet. App. 39a). Cf. *Franks* v. *Delaware*, No. 77-5176 (June 26, 1978), slip op. 8. Moreover, as petitioner acknowledges (Pet. 4-5), on his appeal from the extradition order he submitted the contradictory Poor Bear affidavit to the Canadian Minister of Justice as newly discovered evidence of the falsity of the two affidavits that had been before the extradition court, but the extradition order was nevertheless allowed to stand. In these circumstances, it is not the function of an American court to review the conclusion of the Canadian government that there was, as required by the treaty, sufficient "evidence of criminality * * * according to the laws of" Canada to "justify [petitioner's] apprehension and commitment for trial."

United States v. *Rauscher*, 119 U.S. 407 (1886), and its progeny (see Pet. 11-12) do not aid petitioner's argument. *Rauscher* holds only that an extradited defendant is clothed by virtue of the extradition proceeding with the right, "both in regard to himself and in good faith to the country which had sent him here," to be tried only for the offense for which he was extradited. *Ker* v. *Illinois*, 119 U.S. 436, 443 (1886).[5] We have no quarrel with this

[5] *Ker*, which was decided the same day as *Rauscher*, stands for the relevant proposition that a court is not deprived of jurisdiction to try a defendant for a crime because of irregularities in bringing the defendant before the court. See

holding, which is merely an expression, as a rule of domestic law, of "[t]he 'principle of specialty,' long recognized in international law, [which] provides that 'the requisitioning state may not, without the permission of the asylum state, try or punish the fugitive for any crimes committed before the extradition except the crimes for which he was extradited.' " *Shapiro* v. *Ferrandina*, 478 F.2d 894, 905 (2d Cir.), cert. dismissed, 414 U.S. 884 (1973), quoting from Friedmann, Lissitzyn & Pugh, *International Law* 493 (1969). The latter principle is based in turn on the proposition that the trial of an extradited defendant for a crime other than that for which he was extradited "is not only a betrayal of the understanding of the surrendering nation but an action clearly contrary to the specific authorization of the treaty by

also *In re Johnson*, 167 U.S. 120, 126 (1897); *Frisbie* v. *Collins*, 342 U.S. 519, 522 (1952); *Gerstein* v. *Pugh*, 420 U.S. 103, 119 (1975). Contrary to petitioner's assertion (Pet. 11) and the assumption of the court of appeals (Pet. App. 39a n.17), *United States* v. *Toscanino*, 500 F.2d 267 (2d Cir. 1974), does not represent a disavowal by the Second Circuit of the *Ker-Frisbie* rule. As that court has subsequently explained, *Toscanino* did not hold that jurisdiction is impaired by irregularities—even including illegal abduction—in bringing a defendant before the court. To the contrary, in order for a defendant to be entitled to relief his presence must have been secured "through use of cruel and inhuman conduct amounting to a patent violation of due process principles" (*United States* v. *Lira*, 515 F.2d 68, 70 (2d Cir.), cert. denied, 423 U.S. 847 (1975); see also *United States ex rel. Lujan* v. *Gengler*, 510 F.2d 62, 66 (2d Cir.), cert. denied, 421 U.S. 1001 (1975); *id.* at 69 (Anderson, J., concurring)) to which the state of refuge objects. See *United States ex rel. Lujan* v. *Gengler*, *supra*, 510 F.2d at 68.

the receiving nation." *Autry* v. *Wiley*, 440 F.2d 799, 801 (1st Cir.), cert. denied, 404 U.S. 886 (1971).

The rule of *Rauscher* was satisfied here, since petitioner was tried for the precise crimes for which he was extradited. By the same token, the court of appeals correctly rejected petitioner's claim that, because of the submission of the Poor Bear affidavits, his extradition was procured by a "betrayal of the understanding of" and a lack of "good faith to" Canada, which would not have extradited him had the falsity of the affidavits been known. As mentioned above, the Canadian Minister of Justice had evidence of the falsity of the Poor Bear affidavits before him when he upheld the extradition order on appeal.

2. Petitioner argues (Pet. 12-15) that the district court erred by excluding Poor Bear's testimony that FBI Agents William Wood and David Price had threatened, coerced, and intimidated her into signing false affidavits for use in the extradition proceedings.

a. The district court, after hearing the proffered testimony out of the presence of the jury (see XX Tr. 4409-4436), excluded it on the grounds that the testimony was irrelevant and that as a matter of law Poor Bear "was not a believable witness" (XXI Tr. 4665). The admission of her testimony, the court found, "would be confusing the issues, may mislead the jury and could be highly prejudicial" (XXI Tr. 4657-4658). The ruling that Poor Bear lacked credibility was based on the court's observation that she "was under obvious great mental stress" and had

suffered "a complete lapse of memory on cross-examination relating to recent events" (XXI Tr. 4657). The court also noted that she had been described by petitioner in his opening statement (in anticipation that she might be called by the government) as a "witness whose mental imbalance is so gross as to render her testimony unbelievable" (XXI Tr. 4655-4656; see also I Tr. 47); it stated its concern that "much of her mental imbalance may arise from fear," which it implied may have been caused by threats from petitioner or his colleagues (XXI Tr. 4659). Although the court acknowledged that her credibility might nevertheless be a question for the jury if her testimony were "otherwise relevant," it ruled that "under the Rules of Evidence" it was not otherwise relevant (XXI Tr. 4659) because neither Poor Bear nor Agents Wood and Price had been government trial witnesses (XXI Tr. 4657), and hence the proffered testimony was "related to a collateral matter" (XXI Tr. 4665).

The court of appeals correctly concluded that, "in light of its low probative value, the potential for further delay in the trial, and the danger of unfair prejudice to the government," the exclusion of the Poor Bear testimony was not an abuse of the trial judge's broad discretion under Rule 403, Fed. R. Evid. (Pet. App. 34a-35a; see also *id.* at 32a). In reaching this conclusion, the court below first observed that the proffered testimony "was only minimally relevant," since Poor Bear had not been a prosecution witness and petitioner had "made no show-

ing that the integrity of the government's evidence against him was in any way tainted" by the agents' alleged intimidation of her (*id.* at 32a). Next, the court agreed that Poor Bear's voir dire testimony and petitioner's own description of her in his opening statement showed that she was "not a reliable witness" (*id.* at 34a). Finally, the court noted the probability that the admission of her testimony would have evoked countervailing evidence from the government, "thus extending an already lengthy trial," and would "clearly have tended to divert the jury's attention from the issue before it—[petitioner's] guilt or innocence" (*ibid.*).

b. Petitioner contests the finding by both courts below that the proffered Poor Bear testimony was irrelevant, asserting two grounds for relevance. First, he claims that her testimony would have shown "the bias and hostility of two government witnesses, Woods and Price" (Pet. 6); such evidence, he argues, is always admissible "to contradict a witness' testimony or prove incredibility" (Pet. 13). The short answer to this contention is that the agents did not testify as government witnesses or even testify before the jury; their only appearance was as witnesses called by petitioner himself to testify outside the presence of the jury in support of his effort to introduce the Poor Bear testimony and similar testimony by Eagle.[6]

[6] Petitioner advanced a totally different argument in the court of appeals, contending that the Poor Bear testimony might have caused the jury to speculate whether the trial testimony of government witnesses Michael Anderson, Wilford Draper, and Norman Brown was the result of coercive FBI interrogation and hence of dubious reliability (see Pet. App. 33a)—a proposition finding some support in *United States* v. *Haggett*, 438 F.2d 396, 399 (2d Cir.), cert. denied, 402 U.S. 946 (1971), a case cited by petitioner (Pet. 13). *Haggett*, however, has been limited by the Second Circuit to cases in which there has been "almost complete preclusion of cross-examination as to a witness' motive for testifying." *United States* v. *Blackwood*, 456 F.2d 526, 530, cert. denied, 409 U.S. 863 (1972); *United States* v. *Pacelli*, 521 F.2d 135, 139 n.1 (1975), cert. denied, 424 U.S. 911 (1976). Here, as the court of appeals pointed out in rejecting petitioner's argument (Pet. App. 33a), the district court allowed full inquiry into the FBI's dealings with the three witnesses (see V Tr. 839-848, 854-855, 859-860, 886, 888, 898, 900-901; VI Tr. 1082-1088, 1095, 1100, 1106, 1114-1116; XXII Tr. 4700-4843). Hence, Poor Bear's testimony concerning her dealings with the FBI would have been entirely collateral.

Second, petitioner argues more broadly that the Poor Bear testimony should have been admitted as evidence of "government consciousness of a weak cause" (Pet. 6, 12). Invoking the proposition that proof that a defendant attempted the spoliation of evidence is admissible to show consciousness of guilt (Pet. 15-16), he argues that on a like basis he should have been allowed to show through the Poor Bear testimony "the government's knowledge of the merits of the entire case" (Pet. 12). The two showings, however, are not comparable. A defendant has direct and personal knowledge of his culpability; an attempt at spoliation of evidence, therefore, like flight, is conduct on his part that may be interpreted as a confession of guilt. The government, however, cannot "confess" a defendant's innocence, since neither it nor its agents has personal knowledge on the sub-

ject. An attempt by a government agent to suppress or alter evidence, should it occur, can show no more than prosecutorial doubts concerning the probative value of the rest of the government's evidence. But these doubts are not "knowledge"; they are opinion or evaluation. A prosecutor's or investigator's evaluation of the strength of his case is not relevant proof of the defendant's guilt or innocence. In short, what petitioner characterizes as the government's "knowledge of the merits of the entire case" is simply not a relevant issue concerning which the jury should have been permitted to hear evidence.

3. In a related claim, petitioner contends (Pet. 16-17) that the district court erred in refusing to instruct the jury that it was "affirmative evidence of the weakness of the government's case" if the government or any of its agents induced any witness to testify falsely in this "or in any related case" (see Pet. 5-6). This contention also was properly rejected by the court of appeals (Pet. App. 24a-25a). As it correctly pointed out, the proposed instruction did not present petitioner's "theory of the case" but rather related to the credibility of witnesses, a subject that was adequately covered by the trial judge's general instructions on impeachment and credibility (see instruction Nos. 28-31, 38, 45). A "theory of the case" is a "possible explanation for the events" explored at trial, such as that the defendant was framed by planted evidence. See *United States* v. *Vole*, 435 F.2d 774, 777 (7th Cir. 1970). A conclusion that the government's case is weak is not an "explanation for the events" but merely an evaluation of the probative force of the government's evidence.[7] In any event, as the court below noted (Pet. App. 25a-26a), there was no evidentiary support for the proposed instruction, since while certain government witnesses testified that they had been threatened, intimidated, or physically abused when questioned by FBI agents during the preliminary stages of the murder investigation, none of the witnesses testified that he had been pressured in any way to give false testimony at trial, and they all affirmed that their trial testimony was truthful.[8]

4. Petitioner's claim (Pet. 17-22) that he was prejudiced by the improper admission of evidence of other crimes and other weapons was subjected to particularly close and exhaustive scrutiny by the

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[7] Contrary to petitioner's assertion (Pet. 17), *Vole* did not hold that a trial judge must give a "weakness of the case" instruction on request. The only holding in *Vole* concerning that instruction was that the instruction was inadequate to remedy the failure to give another requested instruction because it did not reflect the defendant's theory of the case. See 435 F.2d at 778.

[8] One witness did testify that, while his trial testimony was truthful (XXII Tr. 4819-4820), he had given false testimony before the grand jury (XXII Tr. 4808-4812). But a precondition to the giving of a "theory of the case" instruction is that it have legal as well as evidentiary support. *United States* v. *Vole*, *supra*, 435 F.2d at 776; *United States* v. *Cullen*, 454 F.2d 386, 390 (7th Cir. 1971). Petitioner has shown no such evidentiary or legal support for the proposition that an instruction bringing into issue the probative force of the government's case at trial based upon truthful testimony is justified because of the nature of the testimony presented during earlier stages of the case in another forum.

court below (Pet. App. 8a-23a). There is no reason to disturb its careful conclusions.

a. The evidence that petitioner was wanted on a state attempted murder charge was plainly relevant, as the court of appeals held (Pet. App. 10a), to establish the motive for his murder of the agents. Fed. R. Evid. 404(b).[9] Moreover, the district court made every effort to minimize the possibility of unfair prejudice to petitioner—for example, the existence of the outstanding charge was proven by stipulation rather than through testimony, the stipulation omitted the fact that the alleged victim was an off-duty police officer, and the court instructed the jury that petitioner was presumed to be innocent of the attempted murder charge and that evidence concerning the charge was to be considered only on the issue of motive and not in respect to petitioner's character (see Pet. App. 10a-11a).

b. The evidence concerning petitioner's resisting arrest in Oregon by the use of deadly force and subsequent theft of a rifle and pick-up truck from a nearby residence was admissible to show proof of flight, which in turn was relevant to show his consciousness of guilt (see Pet. App. 11a-18a). As the court of appeals noted (*id.* at 13a), petitioner fled

[9] The government offered testimony at trial that, upon his apprehension in Canada, petitioner stated that the two agents had been killed when they came to arrest him on the state warrant (XVI Tr. 3405-3408). Unless the prosecution had been permitted to introduce evidence that there was, in fact, a state warrant outstanding for him, petitioner could have attacked the veracity of that testimony.

the Pine Ridge Indian Reservation immediately after the murders and remained a fugitive until he was arrested in Canada seven months later; the Oregon incidents were a continuation of that immediate flight. The two vehicles in which petitioner and his companions were proceeding at the time of the attempted arrest were traveling arsenals linked by communications devices and codes manifestly designed to avoid arrest (*id.* at 13a-14a); more important, one of the vehicles contained evidence (Agent Coler's revolver) directly linking petitioner to the murders. In addition, petitioner's theft of a vehicle and a firearm immediately after being separated from his means of transportation and his arsenal (other than the sidearm he used to effectuate his escape) was relevant to show the continuing flight.[10] In short, as the court below correctly held (*id.* at 13a), the test enunciated in *United States* v. *Myers*, 550 F.2d 1036, 1049 (5th Cir. 1977), for determining the probative value of flight as circumstantial evidence of guilt was fully met in this case.[11] Here,

[10] Petitioner's connection with the theft of the vehicle and firearm was shown both by his fingerprints (which were found at the site of the theft) and his possession of the firearm when he was thereafter arrested in Canada (see Pet. App. 17a).

[11] Contrary to petitioner's assertion, there is no conflict among the circuits concerning whether evidence of other crimes may be used to show flight. The Fifth Circuit did hold in *Myers* that the introduction of other crime evidence is limited to "a purpose sanctioned by Rule 404(b) of the Federal Rules of Evidence" (see 550 F.2d at 1044), and flight is not one of the purposes listed in the Rule. In a subsequent en banc opinion, however, that circuit reversed its prior position and held that the sole test for the admission of other

there were undeniably "deliberately furtive actions and flight at the approach of * * * law officers," which "are strong indicia of *mens rea* * * *." *Sibron* v. *New York*, 392 U.S. 40, 66 (1968).[12]

c. Finally, the court of appeals properly rejected petitioner's claim that he was prejudiced by the admission of other weapons evidence (Pet. App. 15a, 18a-23a). The weapons fall into four categories (see Pet. 8-9): (1) those seized from the two vehicles in which he and his companions were traveling when the attempt was made to arrest him in Oregon; (2) those (including the rifle he stole in Oregon) seized when he was arrested in Canada; (3) those (including the murder weapon and a rifle belonging to one of the slain agents; see Pet. App. 19a) recovered by police after a vehicle in which co-defendant Robideau and two others were riding exploded on the Kansas Turnpike; and (4) those (including the service revolver of one of the slain agents, spent cartridges

crime evidence is that it be "relevant to an issue other than the defendant's character," that it "possess probative value that is not substantially outweighed by its undue prejudice," and that it "meet the other requirements of Rule 403." *United States* v. *Beechum*, 582 F.2d 898, 911 (1978), petition for cert. pending, No. 78-5774. There is, moreover, no merit to petitioner's argument (Pet. 20) that the probative value of flight as an indication of consciousness of guilt is weakened when the flight is shown by other crime evidence. Manifestly, a fugitive who resists arrest by the use of deadly force and undertakes theft to procure the means to continue his escape and a weapon to avoid future apprehension displays a greater consciousness of guilt than does one who merely runs away.

[12] In any event, even if the trial judge abused his discretion in admitting evidence of the Oregon incidents, the error was harmless beyond a reasonable doubt (Pet. App. 17a).

from the agents' firearms and two firearms used against the agents in the gun fight; see *id.* at 21a-22a) seized after a search incident to an unrelated arrest on the Rosebud Indian Reservation in South Dakota.[13]

The weapons in the first two categories were clearly relevant to petitioner's armed flight and the inference of consciousness of guilt to be drawn therefrom. Moreover, as the court below explained (Pet. App. 19a-20a), the introduction of weapons or pictures of weapons recovered from petitioner's confederates' car in Kansas (other than the murder weapon and the agent's rifle, which were plainly admissible) was necessary as part of the ballistic proof linking the murder weapon to the murders[14] and as

[13] The evidence showed that petitioner and other participants in the gun fight fled immediately to the Rosebud Reservation, where they remained for some time before splitting up. Robideau and his two companions left the Rosebud Reservation in the vehicle that later exploded on the Kansas Turnpike (see Pet. App. 5a-6a). The explosion occurred on September 10 and the Rosebud search occurred on September 5, 1975, a little more than two months after the murders. It was stipulated that petitioner was not present at either the explosion or the Rosebud search (see *id.* at 20a, 22a).

[14] Because the murder weapon was damaged in the explosion, the ballistics expert had to remove the bolt and place it in another rifle of the same make in order to conduct a test firing linking the weapon to a cartridge casing found in the automobile trunk of one of the agents (see Pet. App. 6a, 19a). It was necessary to introduce the other explosion-damaged weapons in order to show the effect of the explosion on all of the firearms contained in the vehicle and thereby to dispel any inference that a fraudulent test firing had been undertaken to link the rifle to the murders.

evidence linking the occupants of the vehicle to firearms found at the murder scene. Finally, those weapons and cartridges seized at the Rosebud Reservation that were linked to the gun fight were "clearly relevant and strongly probative" (*id.* at 22a).[15] Only testimony, not physical exhibits or photographs, was introduced concerning the remaining items seized at the reservation, and the testimony was introduced solely for the purpose of detailing the discovery of the evidence directly related to the gun fight. Hence, as the court of appeals correctly held (*id.* at 23a), most of the weapons evidence was unquestionably admissible and any error in the admission of the remainder was essentially cumulative and thus harmless beyond a reasonable doubt.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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FEBRUARY 1979

[15] One of the persons arrested at the Rosebud Reservation at the time of the search was Butler, petitioner's confederate.

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